(2)

No. 99-1247

Supreme Court, U.S.
FILED
FEB 26 2000
CLERK

IN THE

Supreme Court of the United States

SANDRA LEIGH STIMPSON,

Petitioner,

v.

CITY OF TUSCALOOSA, J. RUSSELL GIBSON, in his official capacity as member of the Tuscaloosa Civil Service Board; BILL DELOACH, in his official capacity as member of the Tuscaloosa Civil Service Board; RON TURNER, in his official capacity as member of the Tuscaloosa Civil Service Board,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

C. C. TORBERT, JR.
DAVID M. SMITH
CAROLE A. GOLINSKI
MAYNARD, COOPER & GALE, P.C.
1901 Sixth Avenue North
Suite 2400
Birmingham, Alabama 35203
(205) 254-1000

ROBERT W. ENNIS, IV, *City Attorney*
Counsel of Record
City of Tuscaloosa,
Legal Department
P.O. Box 2089
Tuscaloosa, Alabama 35403
(205) 349-0101

Attorneys for Respondents

158109

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

29pp

TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Statement of the Case 1

A. Statement of the Facts 1

B. Statement of the Proceedings 6

Summary of the Argument 9

Reasons for Denying the Writ 10

I. Standard of Review 10

II. *St. Mary's Honor Ctr. v. Hicks* 16

III. New Trial 17

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 14

Austin v. Paramount Parks, Inc., 195 F.3d 715 (4th Cir. 1999) 15

Boyle v. United Technologies Corp., 487 U.S. 500 (1988) 21

Carter v. City of Miami, 870 F.2d 578 (11th Cir. 1989) 18

Combs v. Plantation Paterns, 106 F.3d 1519 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998) 14

Dominium Management Services, Inc., v. Nationwide Housing Group, 195 F.3d 358 (8th Cir. 1999) .. 15

Gilbrook v. City of Westminster, 177 F.3d 839 (9th Cir. 1999) 15

Hoover v. Ronwin, 466 U.S. 558 (1984) 10

Huffman v. County of Los Angeles, 147 F.3d 1054 (9th Cir. 1998) 15

Cited Authorities

Page

Jimenez v. Bancomercio De Puerto Rico, 174 F.3d 36 (1st Cir. 1999) 15

Kelly v. Curtis, 21 F.3d 1544 (11th Cir. 1994) 19

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 16

Llampallas v. Mini-Circuits Lab., Inc., 163 F.3d 1236 (11th Cir.), *cert. denied*, 120 S. Ct. 327 (1999) 15

Long v. Eastfield College, 88 F.3d 300 (5th Cir. 1996) 19

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 18

McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984) 13

Neely v. Martin K. Eby Construction Co., 386 U.S. 317 (1967) 21

New York Elev. R. Co. v. Fifth Nat. Bank, 135 U.S. 432 (1890) 12

Pullman-Standard v. Swint, 456 U.S. 273 (1982) .. 22

Raney v. Vinson Guard Service, Inc., 120 F.3d 1192 (11th Cir. 1997) 19

Cited Authorities

Page

Reeves v. Sanderson Plumbing Products, Inc., 197 F.3d 688 (5th Cir. 1999) 10, 13, 17

Rego v. ARC Water Treatment Co. of Pa., 181 F.3d 396 (3d Cir. 1999) 15

Scamardo v. Scott County, 189 F.3d 707 (8th Cir. 1999) 15

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) 16, 17

Sullivan v. National R.R. Passenger Corp., 170 F.3d 1056 (11th Cir.), *cert. denied*, 120 S. Ct. 402 (1999) 15

Taylor v. Pathmark Stores, Inc., 177 F.3d 180 (3d Cir. 1999) 10, 15

Taylor v. Virginia Union Univ., 193 F.3d 219 (4th Cir. 1999) 15

United States v. Ortiz, 422 U.S. 891 (1975) 12

Virgo v. Riviera Beach Assoc., Ltd., 30 F.3d 1350 (11th Cir. 1994) 18

Walls v. Button Gwinnett Bancorp, Inc., 1 F.3d 1198 (11th Cir. 1993) 12

Cited Authorities

Page

Weisgram v. Marley Co., No. 99-161 (U.S. Feb. 22, 2000) 17, 21

Wills v. Brown University, 184 F.3d 20 (1st Cir. 1999) 15

Statutes:

12 U.S.C. § 1983 6

28 U.S.C. § 216 6

42 U.S.C. § 2000(e) 18

42 U.S.C. § 2000(e)-2(a)(1) 18

Rules:

Federal Rule of Appellate Procedure 28(b)(4) 10

Federal Rule of Civil Procedure 50 ..... 7, 9, 10

Federal Rule of Civil Procedure 50(a) 14, 19

United States Supreme Court Rule 10 ..... 9, 20

United States Supreme Court Rule 10(a) 17

STATEMENT OF THE CASE

A. Statement of the Facts

On May 17, 1975, the Petitioner was employed as a police officer with the City of Tuscaloosa. (R4-111-84). During her employment she had a poor disciplinary record, including giving beer to a prisoner (R4-111-98 through 101, 175 through 181, 372), making a false claim for sick leave (R4-111-188, 189), threatening to shoot a fellow police officer (R4-111-410, 474, 475, 552, 553, 561, 562, 611, 612, 614, 622, 628, 653), deceiving superior officers (R4-111-190, 191, 192, 565, 566, 613), and several other acts of insubordination (R4-111-563) and rudeness to the public (R4-111-171, 372). Over the years she was given numerous "second chances" and every form of punishment short of discharge. (R4-111-633, 645).

The Petitioner also had a very poor attitude. As the Chief of Police, Ken Swindle, testified, "anytime that you work with Ms. Stimpson, it was a confrontation between her and her supervisor. Anytime she was questioned about something, it would be a confrontation." (R4-111-272, 273). He added, "We were all walking around on eggshells." (R4-111-275).

The "straw that broke the camel's back" was an incident that occurred in September of 1992. The Petitioner who was assigned to the Patrol Division (R4-365), came to work with a hard plaster cast "thumb spica" splint on her left hand and wrist which immobilized her wrist and thumb. (R4-111-101, 102, 103, 104, 105, 106, 126, 194, 195, 271, 444, 455, 456, 563). It is undisputed that, although she had a note from her doctor, Dr. Stephen Ikard, allowing her to return to work

following his application of this splint, the note did not state whether she could safely perform all of her duties as a police officer. (R4-111-195, 196, 198, 365).

It is further undisputed that her superiors were concerned that the splint would hinder her ability to perform certain essential functions of her "front line" job such as firing a gun, handcuffing a suspect and restraining drunk or drug-impaired resistive suspects. (R4-111-196, 197, 198, 271, 272, 274, 364, 365, 366, 367, 439, 440). They were also concerned about liability issues should the Petitioner or a third-party suffer injury due to her impairment. (R4-111-276).

The Department's concern had nothing to do with the Petitioner's sex. (R4-111-366, 367, 368, 574). Chief Swindle simply deemed it necessary that "a doctor . . . say he knew what her job functions were and that she could perform them." (R4-111-369, 370, 574).

Assistant Police Chief William Wilkins attempted to resolve these concerns by trying to discuss them with Dr. Ikard. Dr. Ikard's office informed Wilkins, however, that no such discussion could take place unless the Petitioner signed a medical release. (R4-111-277, 278, 362, 263, 512, 513, 566, 567). In accordance with this requirement and consistent with the procedures utilized by the police department when the ability of *male* police officers to do their job was in question, the Petitioner was requested to execute a release (R4-111-567, 568, 569, 570, 607, 608, 609, 610). However, she refused two requests to sign a medical release (R4-111-112, 113, 114, 115, 116, 117, 201, 202, 234, 279, 284, 567, 569) despite her admission that it was reasonable to request such a release of information regarding her wrist. (R4-111-201, 539). Exemplifying her contempt for authority, she

threw one of the releases on a patrol car (R4-111-279) and told Assistant Chief Wilkins it was none of his business. (R4-111-585).

Therefore, Wilkins prepared a form to be signed by a doctor which pointed out that the City had no "light duty" jobs, listed the essential functions of the Petitioner's job and stated that the Petitioner could safely perform those functions. The Petitioner was given the option of simply taking this form to Dr. Ikard for signature on "city time," but she refused. (R4-111-119, 120, 121, 132, 203, 207, 208, 285, 286, 570, 571, 572, 573, 589, 594). She was then ordered (R4-111-535, 536, 537, 538, 563, 564, 574, 577, 587, 594, 595, 663) by Wilkins to go to Emergi-Care Clinic, a medical clinic which performed occupational injury examinations and treatment for the City and other employers, for examination of her hand and wrist and a medical determination that she could safely perform her job functions as a police officer. (R4-111-121, 212, 247, 248, 288, 291, 439, 440, 536, 564, 571, 573, 657). If such a determination was made, she was to have the doctor execute the form and bring it back in. (R4-111-564, 573, 666). If she failed to do so, suspension with pay would result. (R4-111-573, 663).

The Petitioner was extremely angered by this order. Upon her arrival at Emergi-Care, she caused a disturbance while she was both in uniform and on city time, by cursing in the lobby in the presence of employees and patients alike, and by being generally uncooperative. (R4-111-121, 122, 123, 124, 125, 209, 210, 211, 538, 539, 677, 678, 692, 695, 696, 703, 704, 705, 706, 708, 709, 711). She even threatened the doctor who attempted to examine her, Dr. Stephen Lovelady, with a lawsuit. (R4-111-127, 128, 212, 213, 214, 288, 712). As a result, no examination was made. (R4-111-127, 581, 663).

Lovelady then called the Police Department and complained to Police Chief Swindle. (R4-111-142, 234, 235, 289, 290, 268, 448). It is undisputed that Lovelady was upset and angry and told Swindle that while at Emergi-Care, the Petitioner had "created a scene down front," had been hostile, abusive and angry, and "had threatened him with a lawsuit." (R4-111-290, 368, 369, 441, 442, 445, 449, 450, 451, 453, 456, 457, 458, 577).

When later confronted with what had occurred, the Petitioner denied everything. (R4-111-129, 215, 216, 220, 221, 222, 371). Chief Swindle noted that denial and deception was a "pattern in her record" (R4-111-371) and Assistant Chief Wilkins deemed the episode "quite serious" insubordination. (R4-111-561, 564).

In October of 1992, following an investigation of this incident and a review by Chief Swindle of the Petitioner's entire prior disciplinary record (R4-111-297, 370, 395, 400, 401, 426, 450, 451, 453, 555, 556, 559, 560, 630, 632, 692; Defendant's Exhibit 24), Chief Swindle decided to (R4-111-244, 373, 374) institute proceedings against her before the Civil Service Board requesting her discharge after giving her the opportunity to resign. (R4-111-662). This action was taken without any consideration of the Petitioner's sex (R4-111-375, 376). Contrary to the Petitioner's representations in her petition herein, she presented absolutely no evidence of similarly situated male police officers who were treated differently than she was. In particular, no police officer had ever amassed a disciplinary record as extensive and serious as hers. Moreover, she never established that the City's reasons for discharging her were pretextual.

The Petitioner testified during the trial as to her belief regarding the true motivation for the charges:

> Dr. Lovelady was obviously mad, angry when I left the clinic. So I figured it had something to do with Dr. Lovelady being mad at me.

(R4-111-142). In response to questions from her own lawyers, she admitted that the charges against her arose out of the incident at Emergi-Care. (R4-111-234, 235). In an offer of proof to the court, Petitioner's counsel stated that:

> After Chief Swindle got that call, then he set about investigating not because his officer had done anything effectively wrong, but *because Dr. Lovelady and the people at Emergi-Care wanted her punished.*

(R4-111-254). Petitioner's counsel further argued that Lovelady had "no right to call the Chief and report what happened." (R4-111-429).

Significantly, neither the City nor Swindle had the authority to discharge her, and they did *not* discharge her. (R4-111-393, 715). The actual decision to discharge the Petitioner, which was unanimous, was made by the Civil Service Board after a lengthy administrative hearing where the Petitioner was represented by competent legal counsel. (R4-111-394, 395, 415, 578, 716, 719). At the time of the Board's decision, which was on January 8, 1993, (R4-111-157, 228) the Board consisted of two men and one woman. The reason cited by the Board for its decision was the Emergi-Care incident along with the Petitioner's prior disciplinary record. (R4-111-716, 722, 733, 736, Defendants' Exhibit 25).

On April 29, 1993, the Petitioner filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) charging the City of Tuscaloosa with discrimination based on sex and age, and alleging that the earliest and last date discrimination took place was January 8, 1993, the date of the Board's decision, not the date of the City's decision. Notably, she made *no* EEOC charge against the Civil Service Board. (R1-2-Exhibit to Complaint). For future reference, it should be noted that the sole decision challenged by the Petitioner was the decision to discharge the Petitioner which, as a matter of law, could only be made by the Civil Service Board.

B. Statement of the Proceedings

On March 8, 1995, the Petitioner filed suit in the United States District Court for the Northern District of Alabama against Respondent City of Tuscaloosa alleging that she was discharged because of her sex and age, and also because she had filed a lawsuit for overtime under 28 U.S.C. § 216. (R1-2-1, 4).

On August 9, 1995, the Petitioner amended the Complaint to add as additional defendants Respondent Civil Service Board of Tuscaloosa ("the Board"), through its current members, J. Russell Gibson, Bill DeLoach and Ron Turner in their official capacity, and Police Chief Ken Swindle and Assistant Police Chief William ("Billy") Wilkins as additional defendants. This amendment also added a claim under 12 U.S.C. § 1983. (R1-10-1). The claims against Swindle and Wilkins, as well as all claims not based on Title VII and the ADEA, were dismissed pursuant to a stipulation of the parties filed September 8, 1995, leaving only the Title VII and ADEA discharge claim to be adjudicated. (R1-18-1).

The Respondents moved for summary judgment. The City's motion, which was based on the undisputed fact that the decision to discharge the Petitioner was made by the Civil Service Board of Tuscaloosa and not the City, was denied. (R1-20-1).

However, the motion by the Board, which was based on the Petitioner's failure to make a charge of discrimination against the Board to the EEOC, was granted on January 6, 1996. (R1-21-1). Nevertheless, on January 8, 1996, the Petitioner moved to join the Board, again as a "Rule 19 Defendant." This motion was granted on January 11, 1996, without giving the board the opportunity to respond. (R1-26-1).

On January 20, 1998, the trial commenced. Motions in limine filed by each of the parties were made. (R-4-67-1; R4-72-1; R4-73-1). Prior to the presentation of any evidence, the Petitioner voluntarily dismissed her age discrimination claim. The sole theory of liability pursued by the Petitioner at trial was that the City should be held liable for its decision to recommend her discharge. The Petitioner made no effort to prove that the Board's decision to discharge her was motivated by her sex. At the close of the Petitioner's evidence, the Court granted the Respondents' Rule 50 motions with regard to the sexual harassment and punitive damage claims, but denied them in all other respects. (R4-83-1; R4-85-1; R4-111-601, 602, 605). These motions were renewed at the close of all of the evidence but the City's motion was again denied. However, judgment was granted in favor of the Board on the issue of liability. (R4-111-736, 742, 768, 772, 784). The Petitioner moved for judgment as a matter of law (R4-111-736, 737, 742, 783) but this motion was denied (R4-111-754, 783), except with regard to the defense of mitigation. (R4-111-784).

The jury returned a verdict in favor of the Petitioner and against only the City in the amount of $500,000. (R4-86-1). On January 28, 1998, the District Court entered an order entitled "Final Judgment and Permanent Injunction" wherein it, inter alia, enjoined the City, Police Chief Swindle and Assistant Chief Wilkins from discriminating against the Petitioner (R4-88-1); ordered the City *and* the Board to reinstate her (R4-88-1, 2); adjudged that the Petitioner was entitled to $300,000 (R4-88-2); ordered the parties to compute, and the City to pay, the amount of wages and accrued benefits she lost (R4-88-2); and decreed that the Petitioner would be awarded attorney fees. (R4-88-2).

The Respondents' post-trial motions for judgment as a matter of law and for new trial were denied. (R4-89-1; R4-91-1; R4-92-1; R4-93-1; R4-95-1; R5-96-1; R5-97-1; R5-98-1) .

The Respondents filed their notice of appeal on February 18, 1998 (R5-107-1), and amended this notice on March 6, 1998 (R5-113-1) and April 10, 1998. (R5-117-1). The Respondents raised sixteen grounds for reversal. The Petitioner filed a notice of cross-appeal on March 2, 1998, challenging only the initial grant of summary judgment in favor of the Board. (R5-110-1).

On August 30, 1999, the Eleventh Circuit vacated the jury verdict and remanded the case to the District Court with instructions to enter judgment in favor of both Respondents. The Petitioner filed a Petition for Rehearing but that Petition was denied.

SUMMARY OF THE ARGUMENT

Petitions for Certiorari are granted "only for compelling reasons". Supreme Court Rule 10. The Petitioner has not submitted a single compelling reason to grant her petition.

The Petitioner first argues that the Eleventh Circuit's use of an improper standard of review in connection with its review of the District Court's decision on the Respondent's Rule 50 motion compels review by this Court. However, the Petitioner never raised this issue in the Court of Appeals, probably because the standard used by that Court — a standard used by all of the Courts of Appeal — was the standard she had proffered in her Principal Brief to that Court. Furthermore, use of the standard that the Petitioner now prefers would not change the result.

The Petitioner next argues that review is warranted because the Eleventh Circuit required her to adduce direct evidence of a discriminatory intent. Even a cursory reading of that Court's opinion will reveal that this is simply untrue.

Finally, the Petitioner asserts that even though the Court of Appeals determined that she had presented insufficient evidence to support her claim, she should be given a new trial in order to allow her a second chance to carry her burden of proof. The Petitioner was on notice of the elements she was required to prove but intentionally pursued an erroneous theory of liability in the District Court which did not include one of those elements. The Court of Appeals correctly determined that a new trial would be an injustice.

REASONS FOR DENYING THE WRIT

I.

STANDARD OF REVIEW

The Petitioner seeks to piggy back on this Court's recent grant of certiorari in *Reeves v. Sanderson Plumbing Products, Inc.*, 197 F.3d 688 (5th Cir. 1999). The Petitioner contends that, as asserted in *Reeves*, the Court of Appeals in the instant case utilized the incorrect standard of review when deciding whether the District Court erred in its ruling on the Respondents' Motions for Judgment as a matter of law pursuant to Rule 50. Moreover, the Petitioner contends there is a Circuit split over which standard should be applied.

1.

As indicated by the absence of any analysis of this issue in the Eleventh Circuit's opinion (Pet. App. A), the Petitioner never raised this issue in the Court of Appeals, even though Rule 28(b)(4) of the Federal Rules of Appellate Procedure required her to raise it in her principal brief. *Cf. Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 185 (3d Cir. 1999) (appellee suggested an alternative standard of review). She even failed to object to this standard in her Petition for Rehearing to the Court of Appeals. Under these circumstances the issue is deemed waived, thereby precluding this Court's consideration of the issue on certiorari. *Hoover v. Ronwin*, 466 U.S. 558, n.25 (1984).

2.

Yet even more notable, the Petitioner has only herself to blame for the standard that was used. At pages 13-14 of Petitioner's Principal Brief to the Court of Appeals she proffered and vouched for the following standard:

> C. Statement of Standard of Review
>
> 1. Jury Verdict and Judgment as a Matter of Law
>
> This Court will affirm a jury's verdict "if the state of the proof is such that reasonable and impartial minds could reach the conclusion the jury expressed in its verdict . . . [T]he jury's verdict should not be disturbed if there is competent evidence in the record to support it." *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1016 (11th Cir. 1994)) (quoting *Deakle v. John E. Graham & Sons*, 756 F.2d 821, 827 (11th Cir. 1985)). "A verdict may be overturned only if the facts and inferences point so strongly and overwhelmingly in favor of one party . . . reasonable men could not arrive at a contrary verdict." *Overseas Private Investment Corp. v. Metropolitan Dade County*, 47 F.3d 1111, 1113 (11th Cir. 1995). This Court reviews a denial of a judgment as a matter of law *de novo*, but the standard is the same as that employed when reviewing a jury verdict. *Pinnacle Port Community Ass'n v. Orestein*, 952 F.2d 375, 378 (11th Cir. 1992). This Court in reviewing both the jury's verdict and the denial of judgment as a

> matter of law, *must view all evidence* in the light most favorable to Stimpson and may reverse only if it finds that no reasonable jury could have returned a verdict for Stimpson.

(Principal Brief of Appellee/Cross Appellant). In her Petition for Rehearing filed in the Court of Appeals the Petitioner expressly noted that "The panel correctly found (slip op., p.8) that the Standard of Review requires it to view the evidence in the light most favorable to Stimson (sic)", citing with approval *Walls v. Button Gwinnett Bancorp, Inc.*, 1 F.3d 1198, 2000 (11th Cir. 1993), (Pet. For Reh, p.5), a case she now submits was incorrectly decided.

This Court does not and should not condone or reward a party who advocates a litigation position that that party believes to be incorrect, and then gambles on the outcome of that litigation. It should not exercise its discretion to grant review on a writ of certiorari and possibly relieve that party of its disingenuous connivance, particularly where the appellate court has adopted that party's position as its own. *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *New York Elev. R. Co. v. Fifth Nat. Bank*, 135 U.S. 432 (1890).

3.

That the "standard of review" issue does not amount to a "compelling" reason justifying review is demonstrated by the fact that that standard had no effect whatsoever on the outcome of the appeal. As indicated by the Court of Appeal's opinion, because the City did not make the discharge decision, the pivotal issue was whether the Petitioner had carried her burden of proving that her discharge from employment (a decision made by Respondent Civil Service

Board of Tuscaloosa, an agency of the State of Alabama which had the sole legal authority to make that decision) was *caused* by a discriminatory animus allegedly held by Respondent City of Tuscaloosa, her employer:

> Consequently, we hold that Stimpson has failed to produce sufficient evidence to allow a reasonable jury to find causation between the City's alleged discriminatory animus and the Board's decision to terminate her.

(Pet. App. A, 9a).

The Petitioner failed to adduce *any* evidence that the Board's decision was caused by the City's animus, whether legal or illegal. Instead, the evidence was undisputed that the Board had conducted an independent investigation before making its decision, and the Petitioner presented *no* evidence that the Board knew or was made aware of the existence of any improper animus on the City's behalf.

Thus, even if the Court of Appeals had limited its review to "determining only whether the non-movant's evidence supports the jury verdict . . . ," as the Petitioner now suggests (Petition, 12), it would have made the same decision. Implicit in that Court's holding is that *neither* party adduced any evidence that the Board's decision was illegally affected by any alleged animus by the City. Tellingly, the Petitioner even now does not point to any contrary evidence in her Petition. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-671 (1984) (discussing harmless error rule).

By way of contrast, in *Reeves* the plaintiff adduced evidence of age-related statements directed toward the

Plaintiff by an upper-management employee of the decision-making entity who not only participated in the discharge decision, but was married to the actual decision-maker. In reversing the verdict in favor of the plaintiff, the Fifth Circuit did not err in reviewing "all of the evidence." Instead, as the Petitioner in *Reeves* contends, it appears that the Fifth Circuit went beyond merely determining the sufficiency of the evidence. It invaded the province of the jury by weighing disputed evidence and resolving those disputes in favor of the defendant.

In the instant case, the Eleventh Circuit did not do this.

4.

The standard of review utilized by the Court of Appeals was the correct standard. Rule 50(a)(1) of the Federal Rules of Civil Procedure frames the standard for the District Court as being whether there is a "legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." This is the same standard applied by an appellate court in reviewing a District Court's decision of such a motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

One of the tests used by an appellate court in making this determination is whether "reasonable minds could differ as to the import of *the evidence* . . . ." *Id.*, 477 U.S. 250-251. If they could, granting the motion would be error. *Id.*

Thus, reviewing *all* the evidence has long been permitted if not required by this Court. This Court has denied certiorari regarding several Eleventh Circuit cases applying this very standard. *See, e.g., Combs v. Plantation Paterns*, 106 F.3d 1519 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998);

Sullivan v. National R.R. Passenger Corp., 170 F.3d 1056 (11th Cir.), *cert. denied*, 120 S. Ct. 402 (1999); *Llampallas v. Mini-Circuits Lab., Inc.*, 163 F.3d 1236 (11th Cir.), *cert. denied*, 120 S. Ct. 327 (1999).

5.

Finally, there actually is no split among the circuits on this issue. The Petitioner indicates that the Second, Fifth, Seventh and Eleventh Circuits examine "all" the evidence to determine whether a plaintiff has adduced sufficient evidence to create a jury question on a particular issue. Other circuits appear to follow this same procedure. *See, e.g., Rego v. ARC Water Treatment Co. of Pa.*, 181 F.3d 396, 400 (3d Cir. 1999); *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 185 (3d Cir. 1999); *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 727 (4th Cir. 1999); *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 230 (4th Cir. 1999).

Conversely, the Petitioner contends the First, Eighth and Ninth Circuits "consider only the evidence that supports the non-movant." (Petition, 13).

However, each of these circuits appear to use the same standard utilized by the Eleventh Circuit and all other circuits. *See, e.g., Wills v. Brown University*, 184 F.3d 20, 29 (1st Cir. 1999) ("our review on that issue is de novo"); *Jimenez v. Bancomercio De Puerto Rico*, 174 F.3d 36, 40 (1st Cir. 1999); *Scamardo v. Scott County*, 189 F.3d 707, 710 (8th Cir. 1999); *Dominium Management Services, Inc., v. Nationwide Housing Group*, 195 F.3d 358, 363 (8th Cir. 1999); *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999); *Huffman v. County of Los Angeles*, 147 F.3d 1054, 1057 (9th Cir. 1998).

In any event, although the standards are worded differently, there is not a "dime's worth" of difference between their application or the results they produce. Logically, in order to identify what evidence "supports the non-movant" an appellate court necessarily reviews the entire record — "all the evidence" — to identify and separate that evidence from evidence to the contrary. Thus, the standard of review issue is a "red herring" calculated merely to attempt to convince this Court that this case complies with its standards for granting certiorari. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923) (dismissing as improvidently granted a writ of certiorari which had been granted on the mistaken assumption that a circuit conflict existed).

II.

ST. MARY'S HONOR CTR. v. HICKS

Continuing her strategy to fabricate illusory parallels between the instant case and *Reeves*, the Petitioner argues that the Eleventh Circuit's reversal was because she failed to adduce direct evidence of a discriminatory intent. (Petition, 14-18). This is also untrue.

Even a cursory review of the Eleventh Circuit's opinion reveals that the true basis of its decision was the Petitioner's failure to adduce *any* evidence that the City, as opposed to the Civil Service Board, made the discharge decision, or any evidence — direct, circumstantial or otherwise — that the Civil Service Board's decision to discharge the Petitioner was motivated by her sex or was caused by the City's alleged discriminatory animus.

In particular, the Petitioner presented *no* evidence that the legitimate non-discriminatory reasons proffered by *the Civil Service Board* were in any way pretextual. Instead, she merely tried to prove that *the City*, which was not even the decision-making entity, possessed a discriminatory animus, without going a step further and showing the City's animus was the real reason for the Board's decision.

Thus, the Eleventh Circuit was not required to reach the issue posed in *Reeves* regarding whether mere proof of pretext regarding a decision-maker's proffered reasons is sufficient to create a jury issue on the ultimate fact of intentional discrimination. This is the true reason why neither *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), nor any of its Eleventh Circuit progeny, were cited in the Court's opinion.

III.

NEW TRIAL

The Petitioner's final ground for seeking discretionary review is the Court of Appeals' decision to direct entry of judgment instead of granting her a new trial. (Petition, 18-30).

This is another issue that was not raised or passed on in the court below. In particular, the Petitioner did not raise this issue in her Petition for Rehearing to the Court of Appeals. *Weisgram v. Marley Co.*, No. 99-161 (U.S. Feb. 22, 2000) (requiring grounds for new trial to be raised no later than the petition for rehearing to the Court of Appeals).

In addition, the Petitioner does not point to any circuit conflict on this issue or any other compelling reason listed in Rule 10(a) of the Rules of the Supreme Court.

In substance, the Petitioner contends that the legal standards of liability applied by the Court of Appeals to her claim were "new" and that, as a result, she failed to adduce evidence in accordance with those standards. She wants a second chance to prove her case. Significantly, she does not contend that the standards applied by the Court of Appeals were incorrect. She also does not contend that she possesses any new evidence.

The standard applied by the Eleventh Circuit was hardly new. That court summarized the essential elements of a plaintiff's Title VII claim to be that:

> In order to prove intentional discrimination under [42 U.S.C. § 2000(e)-2(a)(1)], a plaintiff must establish (1) the employer's discriminatory animus towards the employee based on the employee's protected characteristic; (2) a discharge or other significant change in the terms or conditions of employment; and (3) a causal link between the two.

(Petition App. A-6a-7a).

Controlling authority which predated the January, 1998, trial of this case dictated these elements. *See, e.g.*, 42 U.S.C. § 2000(e) (prohibiting an employer from discharging an employee "because of" the employee's sex); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (requiring proof of a discriminatory animus); *Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989) (plaintiff must prove "that adverse employment action was taken against him, e.g., discharge, demotion or failure to hire . . ."); *Virgo v. Riviera Beach Assoc., Ltd.*, 30 F.3d 1350, 1362 (11th Cir. 1994)

(requiring proof of a change in an employee's conditions of employment); *Raney v. Vinson Guard Service, Inc.*, 120 F.3d 1192, 1197-1198 (11th Cir. 1997) (citing *Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996) and requiring proof of a causal link). *Cf, Kelly v. Curtis*, 21 F.3d 1544, 1557 (11th Cir. 1994) (intervening act of independent decisionmaker breaks the chain of causation unless plaintiff can show that these intervening acts were the result of deception or undue pressure). In addition, in their Rule 50(a) motions, the Respondents raised the lack of evidence on these necessary elements. Thus, the Petitioner was on notice of these elements and had a full and fair opportunity to present her case in accordance therewith.

What the Petitioner is actually remorseful about is her utter failure to adduce *any* evidence in accordance with these standards. The only theory of liability she actually pursued at trial was premised on her erroneous and baseless assumption that the City of Tuscaloosa could be held liable under Title VII for merely recommending she be discharged, even though that decision did not in any way change the terms or conditions of her employment. In accordance with that trial strategy, she did not even attempt to demonstrate that the City's alleged discriminatory animus caused the Civil Service Board's discharge decision, or that the Board itself possessed a discriminatory animus. Thus, when she complains that the issue of the Board's motivation was not "fully developed" in the District Court (Petition, 22), she has only herself to blame.

The Petitioner argues that the District Court unduly restricted the introduction of evidence on this issue. (Petition, 26). However, the District Court *never* prevented her from introducing whatever evidence she had to establish a discriminatory animus or any other factors which motivated the Board. She simply did not offer any evidence. Therefore,

the District Court properly granted a judgment as a matter of law in the Board's favor. (R4-111-736). The Petitioner did not appeal this decision.

The only evidence barred by the District Judge was evidence favorable to the Respondents, which the Petitioner objected to because of her desire that the jury be left in the dark regarding the Board's true role in her discharge. Nonetheless, the District Judge did admit into evidence the Board's formal written decision stating in great detail the Board's reasons for discharging the Petitioner. (R4-111-716 through 736, Defendants' Exhibit 25). In addition, contrary to the Petitioner's contention (Petition, 22), the entire transcript of testimony and proceedings before the Civil Service Board regarding the Petitioner was a part of the appellate record, although it was not admitted into evidence. (*Id.*)

Thus, if the record on this issue is "incomplete" as the Petitioner now pretends, she, again, has only her own trial strategy to blame. In essence, she has hoisted herself on her own petard.

The Petitioner also claims for the first time that the District Court failed to use the standard applied by the Eleventh Circuit and that this justifies a new trial. The Petitioner did not raise this issue in the courts below. Even if she had, she has no basis for complaining because the District Court ruled in her favor. Even if it had ruled against her, there is no evidence that the District Court applied the wrong standard, as opposed to simply misapplying the correct standard. *See* Rule 10 of the Supreme Court Rules ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

However, it appears that the District Judge, who was thoroughly familiar with this area of the law, not only recognized the proper standards but charged the jury on them in an effort to fit the "round peg" of the Petitioner's misguided theory of liability into the "square hole" of settled precedent. Indeed, the Petitioner quotes from that jury charge as follows:

> [THE COURT]: As I have said, the plaintiff has the burden of proving that the defendant intentionally discriminated against her because of her sex. That is the first element of her burden of proof. In determining whether the plaintiff has carried that burden, your job is to decide just what motivated the Tuscaloosa Police Department to recommend that the plaintiff be discharged. And if you find that the plaintiff's sex was a motivating factor, *that it did make a difference*, then the plaintiff would have carried her burden of proof on the first element of her claim.

(Petition, 19-20). The Petitioner simply failed to adduce any evidence that the City's alleged animus made any difference in the Board's decisionmaking process.

Even if the District Judge had not properly charged the jury, this Court has previously held that the Seventh Amendment guarantee of jury trial does not require a remand for a new trial. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 513-514 (1988). Accord, *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967) and *Weisgram v. Marley Co., supra.* The cases cited by the Petitioner are inapposite. All are non-jury cases where the issue on appeal was the District Court's failure to make a necessary finding of fact, instead of the issue of whether sufficient evidence existed to render a verdict in favor of the

prevailing party. *See, e.g.*, *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982) ("When an appellate court discerns that a district court has *failed to make a finding* because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing finding"). Even in the non-jury context there is not a full blown retrial as the Petitioner herein seeks.

In sum, the Petitioner was on notice of the proper legal standard but failed to adduce evidence in accordance with that standard. Therefore, although the jury rendered a general verdict in favor of the Petitioner against the City (only), the Seventh Amendment does not prevent the Eleventh Circuit from reversing that verdict due to insufficient evidence. It was, in fact, obligated to do so. Nothing required that court to give the Petitioner a "second bite at the apple" by remanding the case for another trial.

CONCLUSION

For the reasons discussed herein above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT W. ENNIS, IV, *City Attorney*
Counsel of Record
City of Tuscaloosa,
Legal Department
P.O. Box 2089
Tuscaloosa, Alabama 35403
(205) 349-0101

C. C. TORBERT, JR.
DAVID M. SMITH
CAROLE A. GOLINSKI
MAYNARD, COOPER & GALE, P.C.
1901 Sixth Avenue North
Suite 2400
Birmingham, Alabama 35203
(205) 254-1000

Attorneys for Respondents